ORIGINAL

No. 01-7662

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

Supreme Court, U.S.
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THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIS IS A DEATH PENALTY CASE.
MR. MILLER-EL IS SCHEDULED TO BE EXECUTED ON FEBRUARY 21, 2002.

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a court is required to ignore uncontested evidence of a pattern and practice of racial discrimination, and evidence of contemporaneous instances of discrimination, when assessing the genuineness of the alleged discriminator's proffered race-neutral reason for exercising a peremptory challenge?

2. Whether the court of appeals incorrectly concluded that 28 U.S.C. § 2254(d)(2) and § 2254(e)(1) require a habeas corpus petitioner to rebut state court determinations of fact by proving them "unreasonable" by "clear and convincing evidence"?

3. When assessing whether the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," may a federal court ignore the unreasonableness of the process by which the state court determined the facts?

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THOMAS JOE MILLER-EL,

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JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner-Appellant Thomas Joe Miller-El asks that this Court issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is published as *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001). *See* App. 1.[1] The state court's unpublished opinion denying Mr. Miller-El's direct appeal, *Miller-El v. State*, No. 69, 677 (Tex. Crim. App. Sept. 16, 1992), is attached as Appendix 2. The trial court's findings of fact and conclusions of law in state post-conviction proceedings is

[1] Mr. Miller-El will cite the record as follows. Citations to the appendices to this petition are indicated by "App. __ at __." The pre-trial *Swain* hearing is cited as "S.F. (P.T.):__." Citations to the *voir dire* are indicated as "V.D. Vol. __ : __." The trial on the merits is cited as "S.F. Vol. __: __."

attached as Appendix 3, and the Texas Court of Criminal Appeals' order adopting the trial court's findings and denying relief is attached at Appendix 4. Appendix 5 is the federal Magistrate Judge's recommendations regarding Mr. Miller-El's federal habeas corpus petition. The opinion of the federal district court adopting the Magistrate Judge's recommendations, *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000), is attached as Appendix 6.

JURISDICTION

On August 7, 2001, the Court of Appeals affirmed the district court's denial of Mr. Miller-El's petition for writ of habeas corpus. The Court of Appeals denied his timely filed petitions for panel and en banc rehearing on September 12, 2001. App. 7. Mr. Miller-El is scheduled to be executed on February 21, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the United States Constitution:

AMEND. XIV

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

AMEND. XIV

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the United States Code:

28 U.S.C. § 2254(d)(2)

An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(e)(1)

[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

The issues presented herein were thoroughly presented to the state courts. Mr. Miller-El was convicted of capital murder and sentenced to death on March 24, 1986, shortly before this Court handed down its decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Prior to the trial on the merits, Mr. Miller-El's counsel challenged the prosecution's jury selection practices after the State used jury shuffles to reduce the chances that African-American panel members would advance to the stage at which they would be individually voir dired for jury service, and subsequently used peremptory challenges to remove ten of eleven qualified African-American jurors. At the pre-trial hearing on his *Swain*[2] motion, Mr. Miller-El adduced considerable evidence[3] that the Dallas County District Attorney's Office engaged in a pattern and practice of excluding citizens from jury service on the basis of race, including an office training manual advising prosecutors to remove minority jurors. App. 8. Nonetheless, the trial court denied Mr. Miller-El's motion. S.F. (P.T.):146.

The Texas Court of Criminal Appeals ("CCA") abated Mr. Miller-El's direct appeal to permit the trial court to conduct a *Batson* hearing, at which the prosecutors offered reasons for their strikes. *Miller-El v. State*, 748 S.W.2d 459 (Tex. Crim. App. 1988). Following the *Batson* hearing, the CCA affirmed Mr. Miller-El's conviction and death sentence in a unpublished opinion. App. 2. The CCA denied rehearing on January 20, 1993, and this Court denied Mr.

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[2] *Swain v. Alabama*, 380 U.S. 202 (1965).

[3] The comprehensive evidence, presented during Mr. Miller-El's pre-trial hearing, of Dallas County's pattern and practice of racial discrimination in jury selection is discussed *infra* in Reasons for Granting the Writ of *Certiorari*.

Miller-El's petition for a writ of certiorari on October 4, 1993. *Miller-El v. Texas*, 510 U.S. 1004 (1993).

In state post-conviction proceedings, Mr. Miller-El sought relief based on his incompetence to stand trial and the trial court's failure to conduct a hearing *sua sponte* regarding Mr. Miller-El's competency to stand trial. App. 3. Mr. Miller-El was arrested for capital murder in Houston, Texas, after S.W.A.T. officers shot him with an exploding round of ammunition that caused extensive internal injuries. S.F. Vol. II:694; Amended Petition for Writ of Habeas Corpus (filed June 17, 1997), *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D.Tex) ("Amend. Pet.") at Exhibit. 18. After spending two months in a Houston hospital, Mr. Miller-El was transferred to Dallas County, where he was tried for capital murder. *Miller v. Johnson*, 261 F.3d 445, 452 (5th Cir. 2001). During his trial, Mr. Miller-El experienced serious medical complications and was transported to the hospital on three occasions. Amend. Pet. at Exhibit 24. The trial court requested medical evaluations of Mr. Miller-El on three occasions. The third request – which followed the onset of medical complications that interrupted the punishment phase proceedings and resulted in Mr. Miller-El's third hospitalization – was for the express purpose of ascertaining Mr. Miller-El's fitness to attend court. App. 1 at 14-15. Yet, despite its repeated questions about Mr. Miller-El's condition, the court never convened a hearing to determine whether Mr. Miller-El was competent to stand trial.

The state courts denied Mr. Miller-El's repeated requests for an evidentiary hearing during post-conviction proceedings. Instead, the convicting court adopted the State's proposed findings of fact and conclusions of law, which had been submitted *ex parte*. App. 9; App. 5. On June 17, 1996, the CCA denied Mr. Miller-El's application for a writ of habeas corpus in a *per curiam* order adopting the findings of the convicting court.

Mr. Miller-El presented his *Batson* and competency-to-stand-trial claims in his federal

habeas corpus petition. The Magistrate Judge recommended that Mr. Miller-El's petition be denied, *see* App. 5, and the district court adopted the magistrate's recommendation on June 5, 2000. App. 6. The Fifth Circuit affirmed the district court, App. 1, and subsequently denied his timely requests for panel and *en banc* rehearings. App. 7.[4]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

ISSUE 1

THIS COURT SHOULD GRANT CERTIORARI AND DECIDE WHETHER COURTS MUST CONSIDER COMPELLING EVIDENCE OF A PATTERN AND PRACTICE OF RACIAL DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES, AND OTHER RACIALLY DISCRIMINATORY BEHAVIOR DURING JURY SELECTION, DURING THE THIRD STEP OF THE DISCRIMINATION INQUIRY.

I. Introduction.

Between 1942 and 1950, this Court was called upon to redress intentional racial discrimination in the selection of Dallas County grand juries on three occasions.[5] The Court's decisions unambiguously condemned the racial discrimination in Dallas County's trial process.[6]

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[4] The opinions of the courts below are discussed at length in the Reasons for Granting the Writ of *Certiorari*.

[5] *Hill v. Texas*, 316 U.S. 400 (1942); *Akins v. Texas*, 325 U.S. 398 (1945); *Cassell v. Texas*, 339 U.S. 282 (1950).

[6] In *Hill*, this Court stated:

> [N]o state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty . . . . Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may command.

Hill, 316 U.S. at 406. *See Cassell*, 339 U.S. at 286 ("Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.").

Not long after this Court admonished Dallas County for excluding its citizens from participation in the justice system on the basis of race, the Dallas County District Attorney's Office prepared a treatise on jury selection in criminal cases advising its prosecutors to "not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." The essential content of this advice remained in the training materials of Dallas County prosecutors at least until 1980. Statistics and other evidence demonstrate that prosecutors were still exercising peremptory challenges on the basis of race at the time of Mr. Miller-El's trial in 1986, especially in death penalty cases. Moreover, the same prosecutors who tried Mr. Miller-El were found to have exercised peremptory challenges on the basis of race in cases tried immediately before and after Mr. Miller-El's. During Mr. Miller-El's trial, the prosecutors removed ten of eleven qualified black jurors with peremptory strikes.

None of the above facts are disputed. At issue, however, is whether any of this compelling evidence is relevant to the genuineness of the prosecutors' motive, or to a court's assessment of the credibility of the proffered race-neutral reasons for their strikes. Based on a mistaken belief that this Court's Equal Protection jurisprudence so required, the courts below refused to consider Dallas County's uncontested pattern and practice of discrimination at any stage of the *Batson* inquiry beyond determining whether Mr. Miller-El had made out a *prima facie* case for discrimination. The lower courts have uncritically accepted the purported race-neutral reasons offered by the prosecutors, without considering the totality of the evidence offered by the petitioner in deciding the ultimate question. This Court should grant *certiorari* to ensure that lower courts do not allow racial discrimination to go unremedied, and to redress the denial of Equal Protection suffered by Mr. Miller-El during his capital trial.

II. Mr. Miller-El assembled and presented compelling evidence that Dallas County's pattern and practice of racial discrimination continued unabated through his trial.

A. Dallas County's pattern and practice of systemic racial discrimination in the selection of petit juries is undisputed.

1. The Dallas County District Attorney's Office promulgated explicit, written policies instructing prosecutors to use peremptory challenges to prevent minorities from sitting on juries.

In 1963, a treatise on jury selection prepared by a top aide to Dallas County District Attorney Henry Wade advised prosecutors in no uncertain terms to prevent "Jews, Negroes, Dagos, Mexicans, or a member of any minority race [from sitting] on a jury." App. 10, 11; *see also Batson v. Kentucky*, 476 U.S. 79, 104 n.3 (Marshall, J., concurring) (quoting newspaper article). In 1969, another treatise, written by Assistant District Attorney Jon Sparling, advised Dallas County prosecutors that minority jurors were undesirable because they "empathize with the accused." App 8 at 3. This jury selection memorandum was incorporated into a training manual given to all new Dallas County prosecutors, and its teachings were often the basis of live presentations by its author. S.F. (P.T.):29-30. The jury selection memo remained, with its discriminatory advice intact, in the prosecutors' manual until at least the early 1980s.[7]

2. Statistical studies demonstrate that at the time of Mr. Miller-El's trial, the Dallas County District Attorney's Office struck 90.3% of qualified black jurors in capital murder cases.

In 1986, the *Dallas Morning News* studied one hundred trials selected at random from the 1,036 felony jury trials held in Dallas County in 1983, and analyzed court records relating to 4,434 prospective jurors in order to determine the race of the jurors, whether they were excluded from jury service, how, and by whom. App. 10, 11; *see* Application for Certificate of

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[7] *See Ex Parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988) (Ron Wells, a Dallas County prosecutor, confirmed that shortly after he joined the district attorney's office in 1980, he was given a copy of the standard prosecutor's manual, which contained the Sparling Memorandum).

Appealability, *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001) ("COA") at 15-21 (discussing Dallas Morning News study and reproducing charts and graphs from the study). The study concluded that although blacks comprised 18% of Dallas County's population, less than 4% of jurors were black. The chance of a qualified black serving on a jury was one-in-ten, compared to a one-in-two chance for a qualified white. *Eighty-six percent* (405 out of 467) of otherwise-qualified African-American jurors were struck with peremptory challenges by the State. *See id.*

The pattern of exclusion in capital murder cases was even starker. In December 1986, the Dallas Morning News published another article examining the fifteen capital murder cases tried in Dallas County between 1980 and December 1986. App. 12, 13. In these fifteen capital cases, the prosecution used peremptory challenges to remove *90.3%* (56 out of 62) of the qualified African-American jurors. Out of 180 jurors in the fifteen trials, only five, or 2.8%, were black. *See id.*

3. Dallas judges and lawyers testified that the Dallas County prosecutors routinely excluded African-Americans from criminal juries in the 1980s.

At Mr. Miller-El's pre-trial hearing, judges and lawyers from Dallas testified that it was common knowledge in the Dallas County legal community that Dallas County assistant district attorneys routinely excluded all African-Americans from jury service in the mid-1980s. Dallas County criminal district court judges provided specific examples of the prosecutors' racially discriminatory selection procedures. S.F. (P.T.):103-04 (one judge testified that a prosecutor had admitted that a jury shuffle had been requested in order to reduce the number of blacks on the jury); S.F. (P.T.):74-77 (another judge testified that he had excluded a prosecutor from his court in 1985 because of discriminatory selection procedures). At a *Swain* hearing held in connection with *Ex Parte Haliburton*, 755 S.W.2d 131 (Tex. Crim. App. 1988), numerous defense attorneys testified that Dallas County prosecutors so consistently used their peremptory challenges against black jurors that the defense attorneys did not "waste" strikes on pro-State black jurors. *See*

Haliburton, 755 S.W.2d at 132-33 & n.4.

4. Mr. Miller-El's prosecutors were trained to employ racially discriminatory tactics and were found to have engaged in intentional racial discrimination in cases tried immediately before and after Mr. Miller-El's.

Paul Macaluso was the prosecutor in charge of the jury selection in Mr. Miller-El's case, a self-proclaimed "jury selection specialist." He joined the Dallas County District Attorney's Office in 1973 and was trained at a time when the office actively taught the racially-discriminatory methods in the jury selection manual. Mr. Macaluso voir dired potential jurors in several of the fifteen capital cases identified in the Dallas Morning News study discussed above, in which 90.3% of qualified African-American jurors were removed by State peremptory strikes. *See* Amend. Pet. at Exhibit 12 (reproducing portions of *voir dire* transcripts).

In a case tried just before Mr. Miller-El's trial, Mr. Macaluso picked the jury and was later found by the Texas courts to have engaged in racially discriminatory selection procedures. *See Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1988). The state appellate court "specifically" considered the race-neutral explanations proffered by Mr. Macaluso, and concluded that his testimony regarding his reasons for striking African-American jurors was *not credible*. The *Chambers* case provides a revealing and critical look at Paul Macaluso's jury selection strategy of manipulating the minimum punishment issue to disqualify African-American jurors:

> In addition to the black potential jurors stricken by the State peremptorily, the State successfully challenged two black potential jurors (Thomas Johnson & Sharon E. Curtis) and unsuccessfully attempted to challenge a third potential black juror (Loretta Rooks) on the basis that they would not consider the *minimum* punishment in the event Appellant was convicted of the lesser included offense of murder. The State made no corresponding effort to challenge potential white jurors on the basis of their willingness to consider the minimum punishment for a lesser included offense.

Chambers, 784 S.W.2d at 31. This pattern of disparate questioning on the minimum punishment issue was also followed in Mr. Miller-El's case. *See infra* at 12. The trial court in *Chambers*

recognized that the State's peculiar and persistent attempts to disqualify *only African-American* jurors on the ground that they may be too favorable *to the State's position* was compelling inferential evidence of discrimination. Mr. Chambers' conviction was reversed. *See Chambers*, 784 S.W.2d at 31-32.

Another prosecutor in Mr. Miller-El's case, James Nelson, was lead counsel in the trial of Mr. Miller-El's wife. Dorothy Miller-El was tried for murder and attempted capital murder only months after her husband was convicted, in the same court and before the same judge. Of the seven African-American potential jurors called for her trial, two were removed for cause by the defense. The prosecution then used five of its strikes to remove all of the remaining African-American venirepersons. The defense demanded a *Batson* hearing. The Texas courts held that the prosecutor's purported race-neutral reasons were a pretext for intentional racial discrimination, and Ms. Miller-El's conviction was overturned. *See Miller-El v. State*, 790 S.W.2d 351 (Tex. App. – Dallas 1990, no pet.).

B. The prosecutors who tried Mr. Miller-El adhered to the racially discriminatory jury selection practices of the Dallas County District Attorney's Office.

1. The prosecutors in this case used strikes to eliminate 91% of the qualified African-American jurors on the panel.

The prosecution struck ten of eleven – or *91%* – of the qualified African-American jurors. Only one African-American, Troy Woods, was allowed to serve on Mr. Miller-El's jury. Mr. Woods was also the only juror of any race to volunteer an opinion that people who commit murder should be slowly tortured to death. V.D. Vol. X:3847-48 ("[Execution is] too quick. They don't feel the pain. That's the way I feel about it . . . . Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment.").

2. The prosecutors race-coded their jury selection materials.

The juror information cards filled out by prospective jurors in Mr. Miller-El's trial did not provide a blank for a juror's race. Nevertheless, the race and gender of every juror is coded on each card, in the prosecutors' handwriting. *See* Supplemental Briefing on *Batson/Swain* Claim Based on Previously Unavailable Evidence (filed December 8, 1997), *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex.), Exhibit 1, at 1-56. The prosecutors also kept racially-coded lists of all selected jurors, and all jurors struck by either side with peremptories. *See id.* at 57-60.

3. The prosecutors attempted to manipulate the "jury shuffle" process in order to effectively eliminate African-American jurors.

At the time of Mr. Miller-El's trial, both the defendant and the State had the absolute right to one jury shuffle.[8] In capital cases in Dallas County, jury shuffles were particularly important, since only the first few members of any of the fifty-member venire panels called each week were likely to be interviewed, and the jurors not reached in a specific week would be discharged from service. *See* V.D. Vol. I:16-17. The likelihood that the jurors at the back of the special venire would be needed was so small that the judge routinely dismissed the last fifteen jurors in the panel before even asking them to fill out questionnaires, as it did in this case. V.D. Vol. II:842-43; V.D. Vol. IV:1700.

At the beginning of the second week of *voir dire*, a panel of jurors was brought down and the State requested a shuffle. V.D. Vol. II:837. The defense asked "Could we ask the reason for the shuffle?" "No," the State responded. *Id.* The defense then made its concerns clear:

> For purposes of the record, I would like the record to indicate that within the first ten jurors, prospective jurors, four are black. Within the second set of ten prospective jurors, three are black and within the third set of prospective jurors, two are black and the fourth set of prospective jurors, one is black.

Id. When the third panel of jurors was originally seated in the courtroom, jurors number 1, 2, 3,

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[8] *Smith v. State*, 648 S.W.2d 695, 696 (Tex. Crim. App. 1983).

4, 8, and 15 were African-Americans. V.D. Vol. IV:1787. The State requested, and performed, a shuffle. *Id.* at 1781. After the State's shuffle, the six African-American jurors' positions had changed: they were now at positions 19, 26, 36, 37, 38, and 39. *Id.* at 1788. The defense then exercised its prerogative to shuffle the jurors. *Id.* at 1780. After this second shuffle, the African-American jurors were located at positions 1, 2, 3, 4, 7 and 14. *Id.* at 1788.

The twice-shuffled panel was then seated, and the last sixteen jurors excused. *Id.* at 1783. Mr. Nelson then asserted, for the first time in the jury selection process that the jurors "were not shuffled as thoroughly as they should have been." *Id.* at 1790. Moreover, despite the fact that both sides had exercised their shuffles in the central jury room on the previous two occasions without objection from either side, *id.* at 1784, the State announced that it wanted a re-shuffle of the jurors because the defense's shuffle had not been performed inside the courtroom, as the law required.

Mr. Miller-El objected, pointing out the State was merely manipulating the position of black jurors. *Id.* at 1787. The court rejected the State's request, ordered that all further shuffles take place in the courtroom, and observed that this was the first time in his twenty-five years practicing law and sitting on the bench in Dallas County that someone had raised an objection in his presence to the routine practice of shuffling in the central jury room. *Id.* at 1792-93.

Of course, the prosecution's efforts to shuffle and reshuffle the potential jurors took place *before* they knew anything about the jurors other than how they looked, because they had yet to fill out the jury questionnaires or be placed on a panel for *voir dire*.

4. Black jurors were subjected to blatantly disparate questioning.

The prosecutors at Mr. Miller-El's trial engaged in glaringly disparate questioning of prospective jurors based on race. For example, the prosecutors singled out black jurors and questioned them about their ability to assess the minimum punishment for non-capital murder, in a

manner almost never employed with white jurors. The form and substance of the *voir dire* were clearly designed to eliminate African-Americans by setting them up for cause challenges. White jurors were generally informed of the range of punishment first, and then asked whether they could impose the minimum sentence of five years, if appropriate to the facts of the case.[9] In sharp contrast, African-American jurors consistently were asked open-ended questions that forced them to speculate as to what the minimum punishment for non-capital murder *should* be, without any information about the actual range of punishment. The prosecutors subsequently used the number named by the juror to argue that the juror would be unwilling to consider the actual minimum sentence.[10] As noted *supra* at 9, the *Chambers* Court specifically cited this practice as evidence

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[9] The questioning of Mary I. Sumrow is a typical example. Before asking her about her attitude toward the minimum punishment in a murder case, the prosecutor twice explained the full range of punishment for murder. V.D. Vol. I:341, 355. He then explained that the range was that wide because "there are several of [sic] a multitude of circumstances under which one person could knowingly or intentionally cause the death of another individual." *Id.* at 355. He continued in this vein:

> Now, in order for you to be able to be qualified to serve as a juror, you have to tell us that you would be able to consider the entire range of punishment for murder . . . . At the other end, you have to be able to tell us that, if you feel that the facts and circumstances, as you find them to be, justify a sentence of five years, you can give that or twenty years or forty-five years, anything in between. As you're sitting there right now, Ms. Sumrow, you don't even have to be able to verbalize to us the facts and circumstances that would justify five years or that would justify life or something in between. You do have to tell us that, if the facts and circumstances justified that in your mind, whatever that may take, you would assess a five year sentence if you felt it was justified or a ninety-nine or life sentence if you felt that was justified.

Id. at 356-57. Ms. Sumrow answered that she could consider the minimum sentence and was accepted for jury service, *id.* at 357, 396, but was later excused due to medical hardship because of her pregnancy. V.D. Vol. VI:2401. Other strong pro-State jurors were handled in a similar manner. *See, e.g.*, V.D. Vol. II:549-51 (Carol Taylor); V.D. Vol. II:765-59 (Billy J. Wagoner); V.D. Vol. VII:2918-20 (Charles M. Smith).

[10] For example, when questioning Roderick Bozeman, Mr. Macaluso talked to the juror extensively about a hypothetical non-capital murder. Mr. Macaluso emphasized that the killing was "without any legal excuse or any legal justification whatsoever," that it was not in self-defense, that it was not an accident, that the defendant was not insane, and that the defendant had not acted in the heat of passion. V.D. Vol. I:308-09. Then, without having informed Mr. Bozeman of the actual range of

of Mr. Macaluso's discriminatory intent. *Chambers*, 784 S.W.2d at 31.

Similarly, the State was quite solicitous of the scheduling conflicts of African-American jurors, while insisting that white jurors who had vacation plans or employment commitments be compelled to serve. When questioning African-American jurors Fields and Bozeman, the State initiated inquiries into whether the juror had upcoming vacation time, or work or family obligations. *See* S.F. Vol. I:317 ("[a]ny problems at work or anything like that, family schedule?"); S.F. Vol. I:445 ("We have an indication, Judge, that this juror has what they denominate as an annual leave coming up in the next couple of weeks and we thought that was a situation that the Court ought to check into before a decision is made as to the qualification of this juror."). By contrast, a white juror requested that she be released from service because of a mandatory work-related training program and a previously scheduled vacation, toward which she already had paid a non-refundable $650.00 down payment. She informed the court that she would be very angry and distracted if she had to serve despite these conflicts and that this state of mind could affect her jury service. V.D. Vol. VIII:3248-52. Although the defense agreed to excuse the juror, the State emphasized that vacations or work training were not adequate excuses and argued, albeit unsuccessfully, that the juror be compelled to serve or that, in the alternative, the court contact her employer to determine whether alternate plans could be made for the

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punishment, Mr. Macaluso stated, "Let's divorce our thinking from those sorts of things and let's talk about a situation where one person knowingly or intentionally causes the death of another. . . . Let me ask you: What do you personally feel ought to be the minimum punishment for somebody committing a murder, sir?" *Id.* at 310. When the juror eventually answered, "I would say twenty years, I guess," the prosecutor asked him to confirm that twenty years would be his minimum sentence, then asked if he was stating that a sentence of five years could never be proper. *Id.* at 312-13. Despite the prosecutor's manipulative questioning, Mr. Bozeman eventually stated that he could consider a five-year sentence for murder if appropriate to the facts and circumstances of the case. *Id.* at 316.

This pattern of questioning on the minimum punishment issue repeated with African-American jurors Joe Warren, V.D. Vol. III:1543-58, Edwin Rand, V.D. Vol. IV:1814-29, and Wayman Kennedy, V.D. Vol. V:2193-2202.

training. *See id.* at 3253-56.

5. The prosecutors' proffered reasons for their peremptory challenges of black jurors were pretextual, in that they applied with equal or greater force to similarly-situated white jurors.

> In the courtroom, [Dallas County] prosecutors commonly exercise peremptory challenges against blacks who voice views and appear to possess qualifications similar to those of the whites selected for the jury.[7]

During Mr. Miller-El's trial, the prosecution offered reasons for their peremptory challenges of black jurors which were pretextual in that they applied with equal or greater force to similarly-situated white jurors. One of the most common reasons proffered by the prosecutors was the black jurors' alleged "hesitancy" to apply the death penalty. For example, Joe Warren, an African-American, was struck peremptorily by the State and, when asked, the prosecutor stated that he had struck Mr. Warren because of his "misgivings" and "mixed feelings" about the death penalty, and because he had indicated he did not agree with the death penalty in all cases. App. 2 at 11.[8]

Joe Warren was an excellent State's juror. He was a married, middle-aged veteran; he had three children; he volunteered for the PTA; he was a member of Crime Stoppers and other crimefighting programs; and he had managed the meat section at a Kroger supermarket for 19 and a half years. App. 14. He repeatedly affirmed that he believed in the death penalty and that he could serve on a capital jury and impose death in an appropriate case. V.D. Vol. III:1526, 1531, 1536-38. The record clearly reveals that, to the extent that Mr. Warren had any "misgivings"

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[7] App. 10, 11.

[8] In attempting to justify his peremptory strike, the district attorney also stated that he had struck Mr. Warren simply because he had a large number of peremptory strikes remaining at that point in the *voir dire*. Given the weakness of the State's other reasons for striking Mr. Warren, this final reason, which necessarily is dependent upon the other stated reasons, is facially insufficient.

about the death penalty, his sole concern was that the death penalty might be *too humane* for murderers.[9] Nevertheless, the Texas court and the federal magistrate judge both upheld the State's peremptory strike against Mr. Warren based on his "misgivings" and "mixed feelings" about the death penalty. App. 2 at 11; App. 5 at 18-19.

Hesitancy about the death penalty is a facially race-neutral reason for exclusion from jury service. However, it was selectively applied only against African-American jurors. Kevin Duke, who was seated as Juror Number 7, had expressed "misgivings" similar to those of Mr. Warren:

> I think you have to have the death penalty. I think sometimes it should be up to the person who is convicted because, if he's sentenced to life imprisonment, sometimes death would be better to me than – being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I just [sic] as soon have it over with than be in prison for the rest of your life. If he's committed a crime like this that maybe he should be convicted of and put away, if he's not put away for life, that's – if he has no chance for parole, then I don't see the difference between death and life imprisonment. If there's a chance for parole, that's a different story, but I think you might as well go ahead and give the death sentence instead of life in prison because it's the same thing to me.

V.D. Vol. VIII:3264. Sandra Jenkins voiced similar sentiments, stating during the State's *voir dire*, "I think that a harsher treatment [than the death penalty] is life imprisonment with no parole." V.D. Vol. III:1074. The prosecutor failed to follow up on this remark, and voiced no objection to Ms. Jenkins serving on the jury. *Id.* at 1127. Clearly, the prosecution's stated

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[9] Mr. Warren stated that he had "mixed feelings" because "sometimes you feel that it might help to deter crime and then you feel that *the person is not really suffering*. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment." V.D. Vol. III:1532 (emphasis added). The prosecutor then asked further questions:

> Q. In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?
>
> A. Yes. In some cases you feel like maybe if the person were to suffer in some other way maybe.

Id.

concern about jurors' hesitations regarding capital punishment was reserved for African-American jurors.[10]

The use of the African-American jurors' alleged hesitancy to impose a death sentence was only one of the pretextual explanations offered by the State. As another example, the State struck some black jurors, such as Billy Jean Fields, for the purported reason that they had relatives with legal troubles. While this is a facially race-neutral reason which is supported by the record, it is patently pretextual, since several comparable pro-death penalty white jurors were not challenged by the State. Mr. Fields testified that his brother had been arrested and convicted for possession of a controlled substance, and had served time. V.D. Vol. I:435-36. A white juror, Noad Vickery, testified that his sister had been arrested and had served time in the penitentiary. V.D. Vol. IV:1601-02. Both men affirmed that they did not know many details. V.D. Vol. I:435-36; V.D. Vol. IV:1601-02.. Both men affirmed (Mr. Fields repeatedly, *see* V.D. Vol. I:443-

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[10] As argued extensively in the Fifth Circuit briefing, numerous other African-American jurors were struck, purportedly because of their reservations about the death penalty, despite their clear statements that they could serve on a capital jury and vote for a death sentence if appropriate. *See* COA at 56-65 (Billy Jean Fields), 76-78 (Edwin Rand), 78-82 (Roderick Bozeman), 82-85 (Carol Boggess), and 85-87 (Wayman Kennedy); Reply to Response in Opposition to Application for Certificate of Appealability ("Reply") at 7-9 (Boggess), 12-14 (Fields), 14-16 (Rand), 16-17 (Bozeman), and 17-18 (Kennedy).

By contrast, white jurors who expressed some reluctance to impose a death sentence were handled very differently by the prosecution. For example, Sandra Hearn repeatedly affirmed that she could *not* give the death penalty for a first offender in an ordinary capital murder case, "[r]egardless of what the facts are, regardless of what the circumstances are[.]" V.D. Vol. XI:4583-85. The prosecutor attempted to rehabilitate Ms. Hearn. She initially stated, "I do not think anyone should be sentenced to a death penalty on [a] first offense." V.D. Vol. XI:4541. The prosecutor replied that he "gather[ed]" from what Ms. Hearn was saying that she would require "a continuing course of criminal conduct" before voting for death. She agreed. *Id.* at 4541-42. The prosecutor then asked if the prior offenses could be something less than murder. When the juror responded that it would "be according to the situation," he suggested that she would "look at each individual case and each individual defendant" in order to render a decision. *Id.* at 4543. Ms. Hearn agreed, "Right." *Id.* However, upon further questioning, Ms. Hearn repeated her view that she could not give the death penalty for a first offense. *See id.* at 4583-85, 4600. Nevertheless, she was seated as Juror Number 12. The prosecution also accepted white jurors Noad Vickery and Gwendolyn Smale, although each had expressed reluctance to impose the death penalty. V.D. Vol. IV:1576-78 (Vickery); V.D. Vol. III: 1298, 1301 (Smale).

44) that the experience with their family members would not affect their judgment in Mr. Miller-El's case. V.D. Vol. I:435-36; V.D. Vol. IV:1601-02. The State, after hearing Mr. Vickery's account, accepted Mr. Vickery. V.D. Vol. IV:1635. After hearing Mr. Fields' virtually identical account, the State seized upon it as one reason to strike him. V.D. Vol. I:455.[11]

In short, Mr. Miller-El presented compelling evidence that the prosecutors manipulated the venire in an effort to exclude African-Americans from his jury. These efforts commenced with the shuffling of the fifty-member venires, *before* the lawyers had any information about the prospective jurors. These efforts persisted, in the form of disparate questioning and peremptory challenges, even *after* the prosecutors learned that many of the African-American venirepersons were very State-oriented jurors.

III. The courts below misapplied this Court's Equal Protection jurisprudence, which requires a factfinder, as part of the inquiry into the alleged discriminator's state of mind, to consider the strength of the inference of racial discrimination created by the *prima facie* case.

A. Under Equal Protection jurisprudence, an overwhelming *prima facie* case of discrimination remains relevant to a court's assessment of the motive behind a peremptory challenge.

In accordance with its written policy, which remained unaltered by this Court's *Swain* opinion, the Dallas County District Attorney's Office engaged in a pattern and practice of racial discrimination while selecting criminal juries at the time of Mr. Miller-El's trial. In case after case, they removed as many African-American jurors as possible – usually every single one – using peremptory challenges. Mr. Miller-El developed a compelling case that the discrimination

[11] This pattern repeats. Chatta J. Nix indicated that her brother was *currently on trial* as part of the I-30 construction scandal. V.D. Vol. V:2379. Moreover, Ms. Nix revealed that *she herself* had been "charged in a conspiracy case" relating to the I-30 scandal. *Id* at 2380. However, without even questioning her about this information, *see id.* at 2345-77 (reflecting that prosecution asked no questions on these subjects during *voir dire*), the State accepted her as a juror. *Id.* at 2399. Cheryl A. Davis's husband was convicted of theft in 1976, and received seven years' probation, which ended in 1983. V.D. Vol. IX:3469-70.

occurred during his trial.

To summarize the three-step inquiry created by *Batson v. Kentucky*, 476 U.S. 79 (1986), the defendant must first make a *prima facie* showing that the prosecution exercised its peremptory challenges based on race. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. Finally, if the first two steps are satisfied, the court must determine whether the defendant has carried his ultimate burden of proving purposeful discrimination. Although the burden of production shifts during this inquiry, the burden of proof on the ultimate issue of discrimination always rests with the defendant. *Purkett v. Elem*, 514 U.S. 765, 768 (1995). This burden-shifting process is common to all inquiries into racial discrimination, whether in criminal cases or in the Title VII context.

In *Swain v. Alabama*, 380 U.S. 202 (1965), this Court first applied the burden-shifting framework to the issue of racial discrimination in the use of peremptory challenges. In a portion of the opinion now superseded by this Court's decision in *Batson*, the Court held that a defendant could make out a *prima facie* case of racial discrimination only by demonstrating that the prosecution had removed jurors "consistently and systematically." *Id.* at 222. If he met this challenge, his proof would create "a fair inference of discrimination . . . which is determinative absent sufficient rebuttal evidence." *Id.* at 227 (emphasis added).

In *Batson*, this Court modified the first step of the burden-shifting inquiry by holding that a defendant could establish a *prima facie* case of discrimination by demonstrating disproportionate exclusion of jurors in his own case. The Court left unchanged the balance of the three-step burden-shifting analysis, and in fact emphasized that a very strong *prima facie* case – one that showed "total or seriously disproportionate exclusion of Negroes from jury venires" – could create an inference of discrimination strong enough to, "for all practical purposes,"

demonstrate discrimination. *Batson*, 476 U.S. at 94 (citations omitted).

The Court's approach in the *Batson* context drew on its Title VII jurisprudence,[12] which had always treated the inquiry into discrimination as a practical assessment of the alleged discriminator's motives. Such an assessment requires consideration of all relevant evidence, including the strength of the *prima facie* case of discrimination. This Court, in a unanimous opinion, recently observed:

> Although the presumption of discrimination [created by the prima facie case] "drops out of the picture" once the defendant meets its burden of [producing race-neutral reasons for its decision], the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual."

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (citation omitted); *see id.* at 147 ("The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

In *Hernandez v. New York*, 500 U.S. 352 (1991), a plurality of this Court endorsed the notion, specifically in the context of peremptory strikes, that a very strong *prima facie* case of racial exclusion can make a state actor's asserted race-neutral motives "simply too incredible" to be believed. *Id.* at 369. Concurring, Justice O'Connor joined by Justice Scalia, also emphasized that the strength of the *prima facie* case of discrimination is relevant in assessing the credibility of the prosecutor's proffered reasons for his challenges: "Disproportionate [strikes of African-American jurors] may, of course, constitute evidence of intentional racial discrimination. The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination." *Id.* at 375 (citing *Batson*, 476 U.S. at 93). Some lower courts take it as a given that the third step of the *Batson* inquiry is vital, and

[12] *See Batson*, 476 U.S. at 94 n.18.

that it requires a consideration of all relevant evidence, including the defendant's *prima facie* case.[13]

B. The courts below held that all of the facts establishing Mr. Miller-El's compelling *prima facie* case were irrelevant to the ultimate issue of whether the State in fact engaged in racial discrimination.

The departure from this Court's Equal Protection jurisprudence – as well as that of the Second, Sixth, Seventh, and Ninth Circuits – started with the Magistrate Judge's opinion, which was by far the most detailed treatment of Mr. Miller-El's claim in any of the courts below, and was the basis for the district court's denial of Mr. Miller-El's petition. Although the Magistrate Judge correctly recited *Batson*'s mandate to consider the "totality of the evidence," the Magistrate Judge repeatedly and explicitly found that Mr. Miller-El's *prima facie* case was not relevant in assessing the prosecution's race-neutral reasons or deciding the ultimate question. For instance, the Magistrate Judge refused to consider proof that the prosecutors who selected Mr. Miller-El's jury had been cited for racial discrimination in other cases because such evidence was

[13] *See, e.g., Coulter v. Gilmore*, 155 F.3d 912, 920 (7th Cir. 1998) ("The *Batson* decision makes it clear that, one way or another, a trial court must consider all relevant circumstances before it issues a final ruling on a defendant's motion." (citing *Batson*, 476 U.S. at 96-97)); *United States v. Alvarado*, 951 F.2d 22, 26 (2d. Cir. 1991) ("In deciding the ultimate issue of discriminatory intent, the judicial officer is entitled to assess each [purportedly race-neutral] explanation in light of *all the other evidence* relevant to prosecutorial intent." (emphasis added)). The Sixth Circuit explained the process clearly:

> At th[e third] step of the analysis, the district court has the responsibility to assess the prosecutor's credibility under all of the pertinent circumstances, and then to weigh the asserted justification *against the strength of the defendant's prima facie case* under the totality of the circumstances. Thus, even though the issue of whether the defendants made out a prima facie case is moot for purpose of deciding whether they met their burden of production at step one, the district court may still assess the *totality of the circumstances* surrounding the strike in the analysis of whether the defendants have met their ultimate burden of proving purposeful discrimination.

United States v. Hill, 133 F.3d 337, 342 (6th Cir. 1998) (emphases added) (citing *Hernandez*); *see also Alvarado*, 951 F.2d at 26 ("As with most inquiries into state of mind, the ultimate determination depends on an aggregate assessment of all the circumstances.").

"only relevant in determining whether a petitioner has established a *prima facie* case under *Batson*." App. 5 at 12-13. The Magistrate Judge likewise brushed aside the historical and statistical evidence of Dallas County's discriminatory practices, because it "only helps him establish a *prima facie* case of discrimination." *Id.* at 21.

After refusing to consider the *prima facie* case, the Magistrate Judge evaluated the purportedly race-neutral reasons advanced by the prosecution. He found one of the reasons advanced by the prosecutor – that African-American jurors had indicated hesitation about the death penalty – to be a race-neutral reason. App. 5 at 14-21. The Magistrate Judge did not address the fact that the prosecution had also advanced other purportedly race-neutral reasons that were clearly pretextual,[14] nor did he take into account the prosecution's attempt to manipulate the jury shuffle, which occurred *before* the prosecutor knew anything about the jurors other than their appearance.

The Magistrate Judge discounted the disparate questioning of African-American jurors as irrelevant to "the relevant inquiry in this case [which] is whether the race-neutral explanations proffered by the state for its use of peremptory challenges were pretextual." App. 5 at 13-14.

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[14] Mr. Miller-El argued that the provision of demonstrably false reasons for a peremptory challenge undercuts the prosecutor's credibility as to any remaining reasons. For instance, the prosecution claimed that it had struck a conservative, middle-aged, pro-death penalty African-American juror named Billy Jean Fields because he was a member of the Roman Catholic Church, whose teachings call for strict limitations on capital punishment. Mr. Miller-El demonstrated that the prosecution had permitted non-African-American Roman Catholics to serve on the jury, and often never even asked those jurors whether the teachings of their church would affect their jury service. Amend. Pet. at 129-31 n.51. Likewise, Mr. Miller-El demonstrated that the prosecutor's reason for striking several other African-American jurors – that they were related to people who had legal problems – was unquestionably false, since the prosecution rarely questioned non-African-American jurors on this topic and never struck a non-African-American juror on this basis. Amend. Pet. at 120-27; *see supra* at 17. The Magistrate Judge ignored Mr. Miller-El's argument that the fact that the prosecution had provided some unquestionably false reasons for its strikes undermined its credibility by showing that it was searching for facially neutral reasons to justify a decision that was truly motivated by racial bias. *See, e.g., United States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989) (although prosecutor had advanced two "adequately 'neutral' explanations taken at face value, the fact that two of the four [other] proffered reasons do not hold up under judicial scrutiny" casts fatal doubt on prosecutor's credibility).

Any evidence of the prosecutor's "motivation" beyond the specific reasons for his peremptory challenges, the Magistrate Judge held, was "simply irrelevant." *Id.* at 13. Thus, even though the prosecutor's racially disparate questioning might have indicated that he was "of a mind to discriminate," it could be dismissed because (1) the prosecutors did not succeed in any of their frequent attempts to exclude African-American jurors for cause based on their responses to the disparate questioning; and (2) when the prosecutors advanced race-neutral reasons for their peremptory challenges, they did not cite the jurors' responses to the disparate questioning. *See* App. 5 at 13-14.[15] By focusing narrowly on whether the disparate questioning directly led to the removal of any jurors, the Magistrate Judge missed its true import. Whether the state successfully removed any African-American jurors using this method is less important than the mere fact that they were *attempting to do so in the first place*.

The Magistrate Judge concluded that there was "considerable" evidence that the Dallas County District Attorney's Office had an "unofficial policy" of excluding African-Americans from juries and that there was "no other explanation for the appalling statistics brought to light" in the 1986 *Dallas Morning News* study. App. 5 at 20. Likewise, he characterized as "disturbing" the manual that "taught Dallas County prosecutors to strike prospective jurors on the basis of race, religion, ethnicity and gender." *Id.* But after he confined the relevance of this "appalling" and "disturbing" evidence to the first stage of the *Batson* inquiry, the Magistrate Judge held that the state court's rejection of Mr. Miller-El's *Batson* claim was not unreasonable.

The District Court, over Mr. Miller-El's objection, upheld the Magistrate Judge's approach in a short portion of a six-page Order: "[Because] an inference of purposeful

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[15] The fact that the prosecutors did not cite the jurors' responses to the minimum-punishment issue as a reason for their peremptories strengthens Mr. Miller-El's case. It suggests that the prosecution raised the minimum-punishment issue not out of concern for potential (pro-State) bias, but solely as a pretext to exclude African-American jurors.

discrimination had already been found by the Court of Criminal Appeals, . . . further discussion of the evidence in support of the *prima facie* case was unnecessary [to an assessment of the prosecutor's race-neutral reasons]." App. 6 at 4. A panel of the United States Court of Appeals for the Fifth Circuit cursorily rejected Mr. Miller-El's argument that established Equal Protection jurisprudence required it to weigh the prosecutor's proffered race-neutral reasons against the strength of the *prima facie* case at the third step of the *Batson* inquiry. The panel reasoned that when this Court partially overruled *Swain* in *Batson*, it rejected *Swain*'s suggestion that the prosecutor's proffered race-neutral reasons should be subject to more stringent scrutiny when the defendant's *prima facie* case was particularly strong.[16] Then, "without commenting on each of the jurors and the reasons proffered for their being excluded," the Court of Appeals held that "[t]he findings of the state court that there was no disparate questioning of the *Batson* jurors and that the prosecution's reasons for striking the jurors was their reluctance to assess and/or their reservations concerning the death penalty are fully supported by the record." *Miller-El v. Johnson*, 261 F.3d at 452. The Court of Appeals did not address the apparent conflict between this statement and the approach of the Magistrate Judge, who had acknowledged that jurors had been questioned in a racially disparate manner.

C. Decisions like those of the courts below will effectively insulate discriminatory practices from review by confining even staggering evidence of purposeful discrimination to the first step in the *Batson* inquiry.

Deciding the ultimate issue of discrimination is "sensitive and difficult."[17] This Court has

[16] The lower court referred to the "rebuttal stage of the evidentiary formulation of *Swain*," erroneously taking Mr. Miller-El to argue that a particularly strong *prima facie* case required the prosecution to advance something *more convincing than a race-neutral reason* at stage two of the burden-shifting inquiry in order to avoid an immediate finding of discrimination. *Miller-El v. Johnson*, 261 F.3d at 451.

[17] *United States Post. Serv. v. Aikens*, 460 U.S. 711, 716 (1983).

warned lower courts against distorting the three-step burden-shifting inquiry – a "sensible, orderly way to evaluate evidence [of discrimination] in light of common experience" – by applying it in a "rigid, mechanized, or ritualistic" way.[18] The lower courts did not heed this warning. The lower courts erroneously proceeded on the assumption that the *prima facie* case "drops out of the picture" *for all purposes* once the State advances race-neutral reasons for its peremptory challenges.

In fact, the *prima facie* case, which in this case included evidence of a pattern and practice of intentional racial discrimination, is relevant to the issue of whether the prosecutor's proffered race-neutral reasons withstand scrutiny at the third phase of the *Batson* inquiry. The strength of the *prima facie* case helps determine the level of scrutiny to be applied to the proffered race-neutral reasons. Thus, an actor who stands indicted by a particularly formidable *prima facie* case will face greater scrutiny during the third, determinative stage, at which a court will weigh the totality of the evidence.

The approach of the courts below also frustrates the sensible scheme of incentives created by this Court's discrimination precedents. A useful analogy can be drawn to Title VII cases. When an individual plaintiff complains of one specific instance of discrimination, he bears the burden of proof, and must overcome the assumption that the employer's actions were lawful. Where a class of plaintiffs establishes that a company engaged in a "pattern or practice" of discrimination, that is, that "racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice" – any member of the class is then presumed to have been discriminated against. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984) (quoting *Teamsters v. United States*, 431 U.S. 324, 336 (1977) (footnote omitted)). Mr.

[18] *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978); *see also Aikens*, 460 U.S. at 716 (noting that excessive focus on procedural structure makes inquiry into the actor's state of mind "even more difficult" than it already is).

Miller-El proved that racial discrimination was the "standard operating procedure" not only of the District Attorney's office which tried him, but also the *individual prosecutors responsible for picking his jury*. Neither at the time of Mr. Miller-El's trial nor at any subsequent proceeding did the State demonstrate, or even try to demonstrate, that the pattern and practice of discrimination it followed had ended by the time of Mr. Miller-El's trial. Indeed, Mr. Miller-El cited many cases of intentional racial discrimination by Dallas Country prosecutors *after* Mr. Miller-El's trial, including one case involving one of the prosecutors who tried Mr. Miller-El. Amend. Pet. at 46-60; COA at 26-30.

A *Batson* claim is an individual-instance claim, and the burden of proof therefore never shifts to the prosecution no matter how strong the *prima facie* case. However, as the discussion above shows, a court must subject the prosecutor's strike reasons to more searching scrutiny at the *third* stage of the *Batson* inquiry when the defendant has proven a "pattern and practice" of racial discrimination at the first stage. This requirement is not only in harmony with the three-step procedure set out under *Batson*, it is actually part of it. *See Purkett v. Elem*, 514 U.S. at 768 (noting that the third step of the *Batson* inquiry is the proper time to evaluate the "persuasiveness" of the prosecution's proffered race-neutral reasons and, in light of the record as a whole, determine the ultimate issue of whether the defendant has carried his burden of proving discrimination).

Under the Fifth Circuit's approach, by contrast, the scrutiny applied to the prosecution's race-neutral reasons at the third step of the inquiry remains the same regardless of the strength of the *prima facie* case. A defendant who shoulders the burden of gathering significant additional evidence of discrimination cannot convince the court to scrutinize the prosecutor's race-neutral reasons more carefully, because his additional direct or circumstantial *prima facie* evidence of discrimination will be set aside as "irrelevant" when the court weighs the sufficiency of the

prosecution's strike justifications.

Both the lower court in *Purkett* and the lower courts here slighted step three of the *Batson* inquiry. In *Purkett*, the lower court failed to perform a step three analysis of the prosecutor's reasons because it assigned the prosecutor an erroneously high burden of proof at step two. Here, the lower courts misapplied this Court's precedents by confining the relevance of Mr. Miller-El's *prima facie* case – which established an uncontested pattern and practice of intentional racial discrimination – to step one of the analysis. This approach crippled their ability to assess the "genuineness" of the prosecutor's asserted motivations in light of the totality of the evidence. *Purkett*, 514 U.S. at 769.

The Fifth Circuit's approach unconstitutionally limits the judiciary's ability to combat racial discrimination. Rarely – if ever – has a *Batson* movant assembled a *prima facie* case that includes undisputed evidence of a long history of explicit discrimination, court findings linking the prosecutors who tried his case to other acts of intentional discrimination, training materials openly urging prosecutors to remove minorities, contemporaneous statistical evidence of gross racial disparities, *and* a clear pattern of race-conscious and racially disparate treatment of potential jurors in his case. If a *prima facie* case such as Mr. Miller-El's can be defeated by one unconvincing race-neutral explanation, it is difficult to imagine how *any* defendant could prevail in a *Batson* challenge, short of extracting a confession of discriminatory intent from the prosecutor. And, in fact, the Fifth Circuit has apparently never published a decision granting relief in a *Batson* challenge to the prosecution's use of peremptory challenges.[19] The decision below severely damages a powerful incentive to comply with constitutional standards, and can thus only be

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[19] The Court did grant relief to a defendant who claimed that counsel for his co-defendant had deployed his peremptory challenges in a discriminatory manner. *United States v. Huey*, 76 F.3d 638 (5th Cir. 1996). In that case, the lawyer had explicitly advised the judge that he wanted to remove all minority jurors because he felt they would be offended by tape recordings in which his client used ethnic stereotypes. *Id.* at 639.

regarded as a setback in the struggle to rid the American criminal justice system of racial discrimination.

Conclusion

This case presents a simple question: should Mr. Miller-El's unusually compelling *prima facie* case be considered and assessed at the third step of the discrimination inquiry, which requires the reviewing court to weigh the totality of the evidence against the credibility of the prosecutor's race-neutral explanations? The answer to this question provided by this Court's discrimination jurisprudence is "yes." Because the courts below repeatedly and explicitly discounted the relevance of Mr. Miller-El's *prima facie* case to the ultimate issue of discrimination, their reasoning fundamentally conflicts with decisions of this Court and with other lower courts. *See* SUP. CT. R. 10(c). This Court should grant the writ of certiorari not only to ensure meaningful and uniform enforcement of constitutional guarantees, but also to prevent the unseemly spectacle of an inmate being denied any legal remedy – and being executed – after a trial so obviously tainted by intentional racial discrimination.

ISSUE TWO

THIS COURT SHOULD GRANT *CERTIORARI* TO CLEAR UP CONFUSION AMONG THE FEDERAL COURTS AS TO WHEN TO APPLY 28 U.S.C. § 2254(d)(2) OR § 2254(e)(1) TO STATE COURT FACTFINDINGS, AND TO ADDRESS WHETHER THE AEDPA REQUIRES A PETITIONER TO DEMONSTRATE THE "UNREASONABLENESS" OF A STATE COURT'S DETERMINATION OF FACTS BY CLEAR AND CONVINCING EVIDENCE.

There is widespread confusion in lower courts regarding how and when to apply 28 U.S.C. § 2254(d)(2)[20] and 28 U.S.C. § 2254(e)(1),[21] both of which address federal court treatment of state court findings of fact. Section 2254(e)(1) retains the traditional presumption of correctness and requires that petitioners affirmatively prove, by clear and convincing evidence, that state court factfindings are incorrect. Section 2254(d)(2), however, directs federal courts to independently assess the "reasonableness" of the state court's "determination" of outcome-determinative factfindings. In an opinion emblematic of the muddled jurisprudence that has emerged since the passage of the Antiterrorism Act of 1996,[22] the court below merged the language of the two provisions into one extraordinarily deferential standard of review and – contrary to § 2254(d)(2)'s mandate – refused to examine the serious flaws and irregularities that rendered the state court factfinding process "unreasonable."

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[20] "An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

[21] "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

[22] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 ("AEDPA").

I. The Fifth Circuit incorrectly merged § 2254(d)(2) and § 2254(e)(1) and required Mr. Miller-El to prove the unreasonableness of the state court determinations of fact by clear and convincing evidence.

In addressing Mr. Miller-El's claims for relief, the Fifth Circuit combined the two standards in § 2254(d)(2) and § 2254(e)(1):

> As an appellate court reviewing a federal habeas petition, we are required . . . to presume the state court findings correct unless we determine that [they] resulted in a decision which is unreasonable in light of the evidence presented. *And the unreasonableness, if any, must be established by clear and convincing evidence.*

Miller-El v. Johnson, 261 F.3d at 451 (emphasis added); *see also id.* at 454 (same). Thus, instead of conducting an independent review of the reasonableness of the state court's "determination" of the decisive fact issues, the lower court constructed an ultra-deferential presumption of correctness.[23] Subsequently, and without discussion of the profound defects in the process by which the state court determined the facts, the court simply recited the state court factfindings and deferred to them. *Id.* at 452, 454 ("A state court's competency determination is a finding of fact entitled to a presumption of correctness under § 2254(d)(2).").

Of all the potential approaches to the statutory construction problem posed by the two provisions, combining § 2254(d)(2) and § 2254(e)(1) is the least tenable. First, requiring a petitioner to prove "unreasonableness" by "clear and convincing evidence" results in a standard of review so extravagantly generous to the state courts – and one that is far more imposing than either of the standards in § 2254(d)(2) or § 2254(e)(1) – as to effectively insulate state factfindings from federal review. Second, because the court nullified § 2254(d)(2)'s imperative to examine the reasonableness of the state court's "determination" of the facts, it violated the "cardinal principle" of statutory construction requiring courts to "give effect, if possible, to every

[23] The Magistrate Judge similarly concluded that, "any defects in the state habeas proceeding were immaterial," because the state court factfindings are presumed correct. App. 5 at 37.

clause and word of a statute." *(Terry) Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'" (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)) (internal quotation marks omitted). Just as this Court declined to adopt Justice Stevens' interpretation of § 2254(d)(1) because it failed to "give independent meaning to both the 'contrary to' and 'unreasonable application' clauses" of the provision,[24] it should prevent the lower courts from reading any independent significance out of § 2254(d)(2). Congress would hardly have enacted the new 28 U.S.C. § 2254(d)(2) alongside the already-existing language concerning the presumption of correctness found in § 2254(e)(1) unless § 2254(d)(2) was intended to add something new. Similarly, Congress could easily have combined the two different standards into one provision (as the court effectively did), but chose not to do so.

II. This Court should resolve the inherent tension between § 2254(d)(2) and § 2254(e)(1) and accord each provision independent significance.

A. There is an inherent tension between § 2254(d)(2) and § 2254(e)(1).

The two separate provisions in 28 U.S.C. § 2254 which address the effect of state-court factfindings on federal habeas corpus review are facially inconsistent. Section 2254(e)(1) mandates that state court factfindings "shall be presumed to be correct" absent a showing to the contrary "by clear and convincing evidence." Section 2254(d)(2), on the other hand, requires federal courts to assess the reasonableness of the state court's determination of the facts in light of the evidence before the state court. In other words, § 2254(d)(2) explicitly instructs federal courts to look past the state court factfinding itself and inquire whether the determination of the fact was reasonable in light of the record. Thus, there is an inherent tension between these two provisions because they require that federal courts both: (1) presume state court's factual

[24] *(Terry) Williams v. Taylor*, 529 U.S. at 404.

conclusions are correct unless a petitioner comes forward with clear and convincing evidence that rebuts them; and, (2) examine the quality of the state court's work in reaching its factual conclusions.[25]

B. The evident tension between § 2254(d)(2) and § 2254(e)(1) is resolved by considering each provision within its appropriate context.

Section 2254(e) regulates fact development and the operation of the presumption of correctness in federal habeas corpus proceedings. Federal courts are required to presume that state court factfindings are correct unless the petitioner produces clear and convincing evidence rebutting them. On the other hand, § 2254(d)(2) is a limitation on a federal court's ability to grant a writ of habeas corpus once it has found a constitutional violation, like § 2254(d)(1).[26] Section 2254(d)(2) directs a federal court to scrutinize what the state court did with the evidence before it, and allows for habeas relief when the state court's decision resulted from an objectively unreasonable determination of the facts.

Thus, § 2254(e)(1) requires that a federal court presume that the state court factfindings are correct, but gives the petitioner the opportunity to come forward with *additional* evidence rebutting the presumption clearly and convincingly. This may happen when the state court record is incomplete through no fault of the petitioner, perhaps because the petitioner's ability to investigate in state court was hindered. *(Michael) Williams v. Taylor*, 529 U.S. 240 (2000). If the petitioner meets this burden, then federal court review of his claims that rely upon the new

[25] *See* JAMES S. LIEBMAN, RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 20.2(c), at 751 (3d ed. 1998) ("On first reading, section 2254(d)(2)'s provision for habeas corpus *relief* . . . appears to be contradicted by section 2254(e)(1)'s attachment of a strong, typically *relief barring*, presumption of correctness to (apparently any) 'determination of a factual issue made by a State court.'") (emphasis in the original).

[26] *(Terry) Williams v. Taylor*, 529 U.S. at 412 ("§ 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.").

facts is unencumbered by any deference to the state court decision.

However, when the state court record is complete, and the petitioner's challenge to the state court decision is based on that court's outcome-determinative factual determinations, the analysis should proceed under § 2254(d)(2). At this point, § 2254(e)(1) notwithstanding, § 2254(d)(2) contemplates that a federal court will evaluate the state court record[27] and grant relief if (1) the petitioner has demonstrated a constitutional violation; and (2) the state court denied relief based on an "unreasonable determination" of the facts in light of the evidence before it. Because "unreasonable" modifies "determination," a federal court must examine how the state court "determined" the facts – *i.e.* how the state court "[came] to a decision . . . by investigation, reasoning, or calculation."[28] This inquiry necessarily focuses not just on the factfindings themselves, but also on the *manner* in which the state court arrived at the facts, and whether it was reasonable. Indeed, the decisions of some lower courts applying § 2254(d)(2), in accordance with the plain language of the provision, analyze both the process by which the state court

[27] In *Beck v. Bowersox*, 257 F.3d 900, 901 (8th Cir. 2001), the court of appeals reversed and remanded the case to the district court because a transcript of the state court proceedings relevant to Beck's claim was not filed with the federal court. The Eighth Circuit noted that § 2254(d)(2) and § 2254(e)(1) impose "difficult standards for the habeas petitioner to overcome. *But they require meaningful federal court review of the evidentiary record considered by the state courts.*" *Id.* (emphasis added).

[28] See Merriam-Webster Online Dictionary (http://www.m-w.com/cgi-bin/dictionary).

determined the facts[29] and the substantive content of those findings.[30]

III. Without guidance from this Court, the confusion among the lower federal courts will continue to lead to inconsistent treatment of state court factfindings depending on whether a court chooses to apply § 2254(d)(2) or § 2254(e)(1).

The lack of guidance in the AEDPA itself, or from this Court, has spawned confusion in the lower courts regarding when and how to apply § 2254(d)(2) and § 2254(e)(1), as well as how the provisions intersect analytically. *See Green v. White*, 232 F.3d 671, 672 n.3 (9th Cir. 2000) ("As an analytical matter, the relationship between § 2254(d)(2) and § 2254(e)(1) is not entirely clear. Both appear to address state court factual findings."); *Leka v. Portuondo*, 76 F.Supp.2d 258, 276-77 (E.D.N.Y. 1999), *rev'd on other grounds*, 257 F.3d 89 (2nd Cir. 2001) (noting the lack of guidance on the issue and describing differing approaches to reconciling § 2254(d)(2) and § 2254(e)(1)).

The Ninth Circuit has held that demonstrating that the state court factual determinations were unreasonable pursuant to § 2254(d)(2) negates the presumption of correctness.[31] The First

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[29] *Paxton v. Ward*, 199 F.2d 1197, 1210-11 (10th Cir. 1999) (state court's "factually incorrect description of the evidence" resulted in an unreasonable determination of the facts); *Green v. White*, 232 F.3d 671, 672 (9th Cir. 2000) (trial court abdicated its factfinding responsibility to the appeals court); *Torres v. Prunty*, 223 F.3d 1103, 1109 (9th Cir. 2000) (state court factfinding procedure inadequate because the court refused to order a competency hearing). *See also Valdez v. Cockrell*, ___ F.3d ___, 2001 WL 1530153, at *21 (5th Cir. Dec. 3, 2001) (Dennis, J., dissenting) ("In the present case, the state habeas judge did not read the trial transcript, thus depriving Valdez of a full and fair hearing. In light of this failure, it is disingenuous to conclude that the state court rendered a decision that was based on a reasonable 'determination of the facts in light of the evidence presented' and is therefore entitled to deference.").

[30] *See Gunn v. Ignacio*, 263 F.3d 965, 970 (9th Cir. 2001) ("We have the evidence presented in the state court proceeding in the record before us. We have searched with great care for any words in the sentencing hearing that support the determination [of fact by the state court] . . . . We cannot find any.").

[31] *Torres v. Prunty*, 223 F.3d at 1110 n.6 ("In deciding, as we have, that the state courts' factual determinations were unreasonable within the meaning of § 2254(d)(2), we have decided, of necessity, that on the existing record Torres has rebutted the 'presumption of correctness' of those findings 'by clear and convincing evidence.'").

Circuit, however, has held that after a habeas petitioner offers evidence that overcomes the presumption of correctness, it will then determine whether the proffer convinces the court that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented to the state court.[32] The same approach is evident in a recent decision by a district court in that circuit. *See Dias v. Maloney*, 156 F. Supp. 2d 104, 123 (D. Mass. 2001) ("a petition for habeas corpus cannot be granted on the basis of section 2254(d)(2) unless the federal court first holds that the state court's factual determinations were incorrect pursuant to section 2254(e)(1)").

Many courts simply gloss over the tension by reading the two provisions as interchangeable, thus rendering either § 2254(e)(1) or § 2254(d)(2) superfluous.[33] The Fifth Circuit has applied the provisions in an apparently random manner in seemingly identical situations. Some panels of the Fifth Circuit have relied exclusively on § 2254(d)(2)'s "unreasonable determination" standard when evaluating state court factfindings. That is, they required petitioners to overcome the presumption of correctness afforded to state court factfindings by showing that the state court decision was based on an "unreasonable determination" of the facts in light of the evidence presented.[34] Other panels of the same court

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[32] *Sanna v. DiPaulo*, 265 F.3d 1, 10 (1st Cir. 2001) ("a habeas petitioner can rebut [the] presumption [of correctness] by adducing 'clear and convincing evidence,' 28 U.S.C. § 2254(e)(1), and a federal habeas court will issue the writ if this proffer convinces it that the underlying state court's adjudication 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' *id.* § 2254(d)(2).").

[33] *McGhee v. Yukins*, 229 F.3d 506, 509 (6th Cir. 2000) ("We defer to the state court's factual conclusions unless they are based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. 2254(d)(2)."); *Ashker v. Class*, 152 F.3d 863, 867 (8th Cir. 1998) ("Mr. Ashker's citations of testimony . . . do not, in our view, provide the 'clear and convincing' evidence necessary to overcome the presumption of correctness that the law assigns to those findings. See 28 U.S.C. § 2254(e)(1); see also 28 U.S.C. § 2254(d)(2)").

[34] *Gardner v. Johnson*, 247 F.3d 551, 557 (5th Cir. 2001); *Tucker v. Johnson*, 242 F.3d 617, 621 (5th Cir. 2001); *Moore v. Johnson*, 225 F.3d 495, 504 (5th Cir. 2000); *Chambers v. Johnson*, 218 F.3d

rely exclusively on § 2254(e)(1).[35] These cases do not mention the "unreasonable determination" standard, but instead suggest that the presumption of correctness can be overcome only by a "clear and convincing" showing of the incorrectness of specific factfindings. In both sets of cases, the choice of standards is simply announced with no explanation of why it is suited to the case at hand. Nor do the factual settings of the various cases provide discernible clues as to why a particular panel chose one standard over the other.

Recently, a panel of the Fifth Circuit split over the proper manner in which to harmonize § 2254(d)(2) and § 2254(e)(1)[36] – though neither the majority's nor the dissent's construction

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360, 363 (5th Cir. 2000); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000).

[35] *Rudd v. Johnson*, 256 F.3d 317, 319 (5th Cir. 2001); *Caldwell v. Johnson*, 226 F.3d 367, 372 (5th Cir. 2000); *Barrientes v. Johnson*, 221 F.3d 741, 774 (5th Cir. 2000); *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

[36] *Valdez*, 2001 WL 1530153, at *7 n.17. The *Valdez* majority stated:

> [T]here is an easier way to harmonize § 2254(d)(2) and § 2254(e)(1). Whereas § 2254(d)(2) sets out a general standard by which the district court evaluates a state court's specific findings of fact, § 2254(e)(1) states what an applicant will have to show for the district court to reject a state court's determination of factual issues. For example, a district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact. See § 2254(e)(1). It is then a separate question whether the state court's determination of facts was unreasonable in light of the evidence presented in the state court proceeding. See § 2254(d)(2). Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).

Id. The dissent, after noting that the question is unsettled, argued that a finding of an unreasonable determination of the facts rendered the presumption of correctness inoperable:

> *Although the courts have not made it clear how § 2254(d)(2)'s "invitation to decide whether the state fact determinations were reasonable . . . fit[s] with the presumption that the state fact determinations are correct,"* leading scholars contend that reading § 2254(d)(2) and § 2254(e)(1) in *pari materia* yields results similar to those reached when § 2254(d) explicitly provided that the denial of a full and fair hearing defeated the presumption of correctness.

resembled the one applied to Mr. Miller-El's claims.

There is even confusion as to the effect of satisfying the § 2254(d)(2) inquiry. Acknowledging, but disagreeing with, Justice Stevens' concurring opinion in *Williams v. Taylor*,[37] a panel of the Second Circuit has concluded that the "negative constraint on the authority of a federal habeas corpus court [contained in § 2254(d)(2)] does not necessarily carry the affirmative implication that whenever a state court adjudication is based on 'an unreasonable determination of the facts in light of the evidence,' the writ should issue." *Francis v. Stone*, 221 F.3d 100, 115 (2d Cir. 2000). Other courts have held that a habeas petitioner is entitled to relief if he demonstrates that a state court decision is based on an unreasonable determination of the facts in light of the evidence.[38]

This Court should grant *certiorari* to resolve the tension between § 2254(d)(2) and § 2254(e)(1) and end the confusion in the lower courts.[39]

IV. The Fifth Circuit's review of Mr. Miller-El's competency-to-stand-trial and *Batson* claims pursuant to § 2254(d)(2) was unduly deferential because the court refused to consider the unreasonable manner in which the state court ascertained the outcome-determinative issues of fact.

Pursuant to § 2254(d)(2), Mr. Miller-El argued that the state court denial of his claims that the trial court should have conducted a competency hearing *sua sponte*, and that he was in

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Id. at 21 (Dennis, J., dissenting) (quoting CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4265.2 (2d ed. & Supp. 2001)) (emphasis added) (footnotes omitted).

[37] 529 U.S. 362, 386 (2000) (Stevens, J., concurring) (28 U.S.C. § 2254(d)(2) "provides for the habeas remedy when a state-court decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.'" (emphasis omitted)).

[38] *Gunn v. Ignacio*, 263 F.3d at 971; *Torres v. Prunty*, 223 F.3d at 1110; *Green v. White*, 232 F.3d at 672.

[39] *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.Ct. 1678, 1682 (2001) ("We granted the petition to resolve confusion among the Courts of Appeals"); *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 763 (1998) (noting the "tension which . . . has caused so much confusion among the Courts of Appeals").

fact incompetent to stand trial, resulted from an unreasonable determination of the facts in light of the evidence presented to the state courts. Mr. Miller-El's argument is based on both the procedural and substantive "reasonableness" of the state court determinations of fact during state habeas corpus proceedings.

Mr. Miller-El proffered medical and jail records which demonstrated the severity of his condition, as well as evidence that the trial court requested evaluations of his condition on three separate occasions. Amend. Pet. at Exhibits 18, 21-24. Mr. Miller-El also proffered the affidavit of Dr. Ari Kiev, which contained his impressive credentials as both a doctor and a lawyer, an inventory of the records he reviewed (which included all of Mr. Miller-El's medical records), and his expert opinion that Mr. Miller-El was incompetent to stand trial according to the correct legal standard. Amend. Pet. at Exhibit 19.

In response, the State submitted the affidavit of Dr. Steven Bowers. Amend. Pet. at Ex. 25. The Bowers affidavit contained no information about his education, background, or training, except that he was the medical director of the Dallas County Jail. The affidavit failed to indicate whether he was in fact a physician. The inventory of materials reviewed by Bowers did not include all of Mr. Miller-El's medical records; specifically excluded were the hospital records detailing Mr. Miller-El's injuries and extended treatment in Houston, and the records relating to his hospitalizations in Dallas during trial. Finally, the Bowers affidavit recited an incorrect standard for competency to stand trial before declaring that Mr. Miller-El was competent.

The state court abdicated its factfinding authority to the State when – after Mr. Miller-El's repeated requests for an evidentiary hearing were denied – it allowed the State to submit proposed findings of fact and conclusions of law *ex parte*, and adopted the State's findings *verbatim*. App. 9. Although the parties submitted conflicting expert opinions, by affidavit, regarding Mr. Miller-El's competency to stand trial, the factfindings omit any reference to Mr.

Miller-El's expert or the opinion he rendered. Instead, despite the submission of an expert opinion, and supporting documents, that Mr. Miller-El was incompetent, the findings state that Mr. Miller-El offered "nothing to show that any evidence presently exists of applicant's alleged incompetency." App. 3 at 7.

Additionally, the record reflects that the trial court doubted Mr. Miller-El's competency to stand trial. The medical records submitted to the state court contained the trial court's three separate requests for medical evaluations of Mr. Miller-El during trial. The court's third request, which was explicitly for the purpose of evaluating Mr. Miller-El's fitness to attend court, resulted in an abrupt halt of the punishment phase proceedings and Mr. Miller-El's third hospitalization during the trial.[40] Despite all of this, the state court signed the State's finding that "the record supports the fact that there was no 'bona fide doubt' as to applicant's competence to stand trial." App. 3 at 7.

The state court ceded the factfinding authority to the State in an *ex parte* proceeding, wholly ignored the evidence proffered by Mr. Miller-El, and relied on the opinion of a purported expert despite the absence of any evidence he was sufficiently qualified or informed to render an expert opinion. This constituted an objectively "unreasonable determination" of whether Mr. Miller-El was competent to stand trial and whether the trial court should have conducted a competency hearing. The Fifth Circuit, however, refused to consider the *manner* in which the state court determined the facts, and whether it was reasonable, and instead summarily deferred to the state court findings. Thus, the Fifth Circuit's analysis ignored § 2254(d)(2)'s clear mandate to examine the reasonableness of the state court's determinations of fact in light of the evidence before it.

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[40] The State's expert, unlike Mr. Miller-El's expert, was not provided with any of the records relating to Mr. Miller-El's hospitalizations during trial.

Likewise, the Fifth Circuit refused to independently assess the "reasonableness" of the state court's factual determination that Mr. Miller-El's prosecutors did not engage in intentional racial discrimination when they exercised peremptory challenges against ten of eleven qualified black jurors. A "reasonable" determination of the genuineness of the prosecutors' motive for its peremptory challenges requires consideration of the overwhelming evidence of a pattern and practice of racial discrimination by the Dallas County District Attorney's Office, as well as evidence of contemporaneous racial discrimination by the individual prosecutors who tried Mr. Miller-El. Pursuant to § 2254(d)(2), Mr. Miller-El is entitled to relief on his *Batson* claim because the state court's factfinding that the prosecutors did not engage in racial discrimination is clearly unreasonable in light of *all* of the evidence to the contrary that was presented to the state courts during his trial and direct appeal.

This Court should grant *certiorari* to untangle the Fifth Circuit's application of § 2254(d)(2) and § 2254(e)(1), and to remedy the constitutional violations that undermine Mr. Miller-El's conviction and death sentence.

CONCLUSION

For the reasons set forth above, Petitioner THOMAS JOE MILLER-EL respectfully prays that this Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in his case.

Respectfully Submitted,

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